United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1063

To be argued by
THOMAS H. SEAR

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1063

UNITED STATES OF AMERICA,
Appellee,

—v.—

WYADELL EDMONDS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Wyadell Edmonds appeals from an order of the United States District Court for the Southern District of New York, entered by the Honorable Richard Owen on November 10, 1975, denying Edmonds' motion to withdraw a prior appeal without prejudice.

Indictment 74 Cr. 474, filed on May 10, 1974 charged in one count that on or about May 1, 1974 defendant Wyadell Edmonds unlawfully, intentionally and knowingly possessed with intent to distribute approximately eleven grams of heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

On May 2[illegible] 1974 Edmonds moved to suppress the heroin that had been seized from him at the time of his arrest and for disclosure of the identity of the informant involved in the case. On July 10, 1974 and September

10, 1974 an evidentiary hearing was held on these motions, which thereafter were denied.

The initial trial of Edmonds ended in a mistrial on December 9, 1974 when the jury was unable to reach a verdict.

On May 22 and 23, 1975 an evidentiary hearing was held on Edmonds' further motions to suppress a tape recording of a conversation to which Edmonds was a party, for disclosure of the identity of the informant, for suppression of the heroin seized from Edmonds and for production of Sarah Roberts, whom defense counsel claimed was the informant, for interview by defense counsel. The trial court ordered the Government to provide defense counsel with the last known address of Sarah Roberts and denied the remainder of the motions.

The second trial of Edmonds ended on May 30, 1975 when the jury found him guilty.

On August 18, 1975 Edmonds was sentenced to 12 years' imprisonment to be followed by three years' special parole.

Through his counsel, Edmonds filed a notice of appeal on August 20, 1975. On or about September 17, 1975 Edmonds himself caused a *pro se* document entitled "Motion to Withdraw Appeal Without Prejudice" to be filed with the District Court. Thereafter, on November 6, 1975, Edmonds' counsel filed an appellate brief for Edmonds and his *pro se* motion was denied by the District Court on November 10, 1975.

On December 12, 1975 this Court heard oral argument by Edmonds' counsel and the Government on the appeal. On February 6, 1976 Edmonds, acting *pro se*, filed a no-

tice of appeal from the District Court's denial of his motion of September 17, 1975.

On May 7, 1976 this Court, in an opinion of Circuit Judge Meskill, with Judge Oakes concurring separately, affirmed Edmonds' judgment of conviction. 535 F.2d 714 (2d Cir. 1976).

Statement of Facts

For a long time prior to May, 1974, Edmonds was in the narcotics business, dealing in both cocaine and heroin in New York City and in Norfolk, Virginia (Tr. 217).*

On April 30, 1974 agents of the New York Drug Enforcement Task Force received information from a confidential informant that Edmonds was going to Norfolk, Virginia by bus and that Edmonds would be carrying approximately two ounces of heroin that would take a "ten cut", which the informant had seen in Edmonds' possession. (July 10, 1974 Hearing, 16, 17, 21). As a result of the information that had been received Edmonds was arrested on May 1, 1974 at the New York Port Authority along with a woman later identified as Christine Summers. (Tr. 30, 31, 241, 273). When arrested Edmonds was carrying a suitcase in which he had eight and one-half grams of virtually pure heroin he had purchased and intended to sell, along with quantities of narcotic dilutants** (Tr. 35, 36, 39, 41, 242-43).

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* The Statement of Facts is a chronological summary of the facts established both at the pre-trial evidentiary hearings, at the second trial and at subsequent proceedings. Citations refer to the pages of the trial transcript of the second trial, except where specific reference is made to the transcript of another proceeding.

** The heroin possessed by Edmonds was of a purity of 99.6% which is an extremely high quality heroin.

Shortly after his arrest Edmonds told the agents that Christine Summers had nothing to do with what they had found in the suitcate and she was released. (Tr. 41, 246, 276).

On May 1, 1974 Edmonds was interviewed by Assistant United States Attorney Alan Kaufman. At that time, the arresting agent informed Kaufman of the circumstances surrounding Edmonds' possession of the heroin at the Port Authority, and after being warned again of his constitutional rights, Edmonds stated that what the agent said was correct. (Tr. 44, 49, 301). He also admitted that he did not himself use narcotics. (Tr. 49).

Roland Thau, Esq., of the Legal Aid Society, was assigned as counsel for Edmonds and represented him at the hearings prior to the first trial. During the period prior to the trial, however, Edmonds became dissatisfied with Mr. Thau as his counsel and expressed his feelings rather strongly at different times. On many occasions he represented that he was going to or had obtained private counsel and in fact refused to talk with Mr. Thau about the facts of the case (July 10, 1974 Hearing, 2-5) (October 16, 1974 Proceeding, 3-6) (March 3, 1975 Proceeding, 5). Just prior to the initial trial, Edmonds, feeling that Thau was not acting in his best interests, asked to represent himself. (Transcript of Trial, December 5, 1974, 57-61). The District Court granted Edmonds' request and appointed Thau to act as Edmonds' legal advisor. During the cross-examination of the Government's first witness, however, Edmonds told the court that "this questioning of the witnesses and things like this, it's just too much for me to handle, really" and requested that Thau act as his lawyer. (*Id.* at 57). Accordingly, Thau represented Edmonds throughout the remainder of the trial, which resulted in a hung jury.

The retrial of Edmonds was originally adjourned so that Edmonds could obtain private counsel. (March 3, 1975 Proceeding). It later was set for April 21, 1975 but during the prior week Edmonds was arrested in Norfolk, Virginia and incarcerated on a bail jumping charge, which necessitated a further adjournment.

On May 12, 1975 Lawrence Kessler, Esq., a professor of law at Hofstra University and an experienced trial attorney was assigned by the court to represent Edmonds and he did so at the hearings prior to the second trial and at the second trial itself.*

During the trial Mr. Kessler located, subpoenaed and interviewed Sarah Roberts, the person Edmonds claimed was the informant, at length. In substance, she stated that prior to May 1, 1974 she had previously been in the narcotics business with Edmonds. Ms. Roberts also denied that she was the informant. (June 18, 1975 Kessler Affidavit; Tr. 379). Mr. Kessler, aware that testimony harmful to Edmonds would be elicited by the Government in its cross-examination if the defense were to call Roberts, persuaded Edmonds that she should not be called as a defense witness. (Tr. 374, 379-80).

During the trial, in his cross-examination of Government witnesses, Mr. Kessler made it clear that he was

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* Certain of the arresting agents were the sole Government witnesses at the first trial. At the retrial the Government was able, in addition to those agents, to call as a witness Jerome Christian, who had been Edmonds' partner in the narcotics business and to whom Edmonds had related the circumstances surrounding his purchase of the heroin and how he had been arrested with it. (Tr. 129-154). Also, the Government played a tape recording made subsequent to the first trial of a conversation in which Edmonds talked in detail about his purchase of the heroin and how he had been arrested with it. (GX 8).

going to argue in summation that Christine Summers, who had been arrested with Edmonds, had planted the heroin on Edmonds without his knowledge, had informed on him and that the agent had feigned her arrest in order to protect her identity. (Tr. 70-72, 91-92, 258; see August 18, 1975 Sentencing, 17-18). When Edmonds' counsel began to make that argument in summation, however, Edmonds interrupted and, in front of the jury, stated that he was not going to allow that argument to be made. (Tr. 367).

Thereafter, Edmonds refused to talk to his counsel and, after being told that such action would prejudice his case, voluntarily absented himself from the courtroom. Summations continued in his absence. (Tr. 367-82, 395).

On June 20, 1976, in light of Edmonds' rejection of the services of Mr. Kessler and upon Mr. Kessler's application that new counsel be appointed, the court held a pre-sentence conference to resolve the status of the representation of Edmonds.

Edmonds reaffirmed that he did not want Mr. Kessler to represent him and stated that he did desire new appointed counsel. (June 20, 1975 Proceeding, Tr. 8-9, 13).

Accordingly, W. Kirkland Taylor, Esq., was appointed as counsel on June 25, 1975 (see Taylor Affidavit of July 18, 1975) and represented Edmonds at his sentencing on August 18, 1975. At that time Edmonds filed two *pro se* motions with the Court, which were denied.* Nonetheless, he also expressed his desire that Mr. Taylor represent him for the appeal and accordingly Mr. Taylor filed

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* "Motion For a Directed Verdict of Acquital and/or a dismissal of all charges for Indictment herein/thereof: "With Prejudice"; "Motion to Correct Illegal Sentence".

a notice of appeal on August 20, 1976. (August 18, 1975 Sentencing).

Subsequent to his assignment, Mr. Taylor "held numerous conversations with the defendant" (Taylor Affidavit of September 22, 1975), filed various post-trial motions with the District Court, (Notice of Motion of July 18, 1975; Notice of Motion of September 22, 1975) and began reviewing the extensive record of the two trials and numerous evidentiary hearings in preparation of the appellate brief. (Taylor Affidavit of November 5, 1975).

On or about September 17, 1975, prior to the docketing of the record on appeal with the Clerk of this Court,* Edmonds himself filed a paper with the District Court entitled "Motion to Withdraw Appeal without Prejudice".** In his motion Edmonds indicated that he wished to withdraw any appeal that had already been submitted by Mr. Taylor on his behalf and that he wished more time for an appeal to be presented to this Court. The only reason given to justify such an extension of time was an alleged need to consider certain "exculpatory evidence" that had been requested in his motions below, which he knew had already been denied.

While Edmonds did ask that the Court "extend him time", it was unclear from the motion whether Edmonds desired that time to appeal *pro se* or so that Mr. Taylor could properly prepare the brief. Edmonds did state that he wanted the alleged exculpatory evidence "so he could properly prepare his appeal and present said issues unto

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* The record was later certified and filed on October 14, 1975.

** The caption on Edmonds' *pro se* motion is headed "United States Court of Appeals for the Second Circuit", but the docket sheet of this Court for the prior appeal does not reflect that the motion was ever sent to or received by this Court.

this said Court pursuant to *ANDERS* v. *CALIFORNIA*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)." Since *Anders* involved the right of an indigent to an appointed lawyer on appeal, Edmonds did not appear to be rejecting the services of Taylor.

A subsequent letter in support of his motion written by Edmonds on October 9, 1976 to this Court, in which he stated that it would be impossible to prepare an appeal in less than six months, did not clarify matters as to what he was requesting or whether he wished to represent himself. He did ask that this Court grant a motion that had been made by Mr. Taylor for an extension of time for Taylor to file the appellate brief on Edmonds' behalf. (See Notice of Motion of September 26, 1975).

Meanwhile, Mr. Taylor was aware that Edmonds had filed his *pro se* motion to withdraw the appeal but continued to prepare the appellate brief because he felt:

> that the defendant did not actually intend the possible result or understand the nature of the motion filed pro se and dismissal of defendant's appeal will deny defendant the review of his case that he clearly desires. (Taylor Affidavit of September 26, 1975, 2)

After obtaining two extensions of time to file, on November 6, 1975, Taylor filed with this Court his brief on behalf of Edmonds.

On November 10, 1975 the District Court denied Edmonds' *pro se* motion to withdraw the appeal. The court noted that assigned counsel had already filed his brief. It further stated that it considered the motion basically to be a request for a six months extension of time within which to file a brief on appeal. Finding no basis for such an extension, or any reason given by Edmonds for it, the court denied the motion.

Included among the many issues raised and argued by assigned counsel on appeal was the claim, based on the Supreme Court's decision in *Roviaro* v. *United States*, 353 U.S. 53 (1957), that Edmonds' right to a fair trial was violated because the identity of the informant, whose tip lead to the arrest of Edmonds, was not revealed. In affirming Edmonds' conviction this Court fully considered Edmonds' claims in that regard and concluded "that the request for disclosure had no real possibility of affording a defense that could create a reasonable doubt in the mind of a reasonable juror". 535 F.2d at 719.

ARGUMENT

POINT I

The District Court Properly Denied Edmonds' Motion to Withdraw His Appeal Without Prejudice.

Edmonds claims that the District Court lacked jurisdiction to decide his motion to withdraw the initial appeal and further argues that the failure to grant that motion denied him his right to pursue his appeal *pro se*. His argument is meritless.

First, as Edmonds himself notes, jurisdiction to decide his *pro se* motion to dismiss the appeal was governed by the terms of Rule 42 of the Federal Rules of Appellate Procedure. Rule 42 contemplates situations by its very terms in which the District Court will and should consider voluntary dismissals of an appeal after a notice of appeal is filed but prior to the docketing of the appeal. Rule 42(a) provides:

> (a) Dismissal in the District Court. If an appeal may be dismissed by the district court upon

> the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.

Rule 12(a) of the Federal Rules of Appellate Procedure provides that in cases such as this one, in which filing fees are not required, an appeal is to be docketed when the record is filed or when a party requests it.* In this case there is no evidence that a request for docketing was made and the record below was filed on October 14, 1975. Therefore, when the District Court received Edmonds' motion on September 17, 1975 it had jurisdiction to consider it.

Further, it is clear on the merits that Edmonds had no right to a voluntary dismissal without prejudice and that the District Court properly denied his motion.

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* Rule 12(a) provides:

> (a) Docketing the Appeal. Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the court of appeals the docket fee fixed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at the request of a party or at the time of filing the record. The court of appeals may upon motion for cause shown enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

** In any case, if, as Edmonds contends, the District Court had not had jurisdiction to consider the motion, this appeal is moot because a defendant obviously can not appeal the denial of a motion by the District Court that it had no power to grant or deny.

As noted, Rule 42 of the Federal Rules of Appellate Procedure does provide for voluntary dismissals of an appeal. In the few cases decided under that rule, however, the dismissals sought or obtained were with prejudice. *See, Blount* v. *State Bank & Trust Co.*, 425 F.2d 266 (4th Cir. 1970); *Moore* v. *Tangipahoa Parish School Board*, 421 F.2d 1407 (5th Cir. 1969); *Morgan* v. *United States*, 386 F.2d 89 (5th Cir. 1967); *Lott* v. *United States*, 218 F.2d 675 (5th Cir. 1955); *Rivera* v. *Ciccone*, 311 F. Supp. 373 (D. Mo. 1969). Edmonds has cited no authority for the proposition that an appellant under any circumstances may withdraw his appeal without prejudice to filing another appeal.

The absence of any instance in which withdrawal of an appeal without prejudice has ever been granted or even requested is not surprising. In order to insure the orderly and expeditious resolution of issues on appeal the Federal Rules of Appellate Procedure provide for time limits, which can be reasonably extended for cause, within which a party may file his appeal and submit a brief to the court urging his position. Fed. R. App. P. 4, 11, 12, 26, 31. If appellants had the right to withdraw their appeals without prejudice to filing a subsequent appeal the various time limits created by Congress would be meaningless.

More importantly, in his papers submitted below on September 17, 1975 and October 7, 1975 Edmonds did not even assert a comprehensible reason why the brief then being prepared by his assigned counsel should be withdrawn and why he should have been granted not less than an additional six months to prepare another appeal. As noted earlier, the only reason for the request Edmonds offered in those papers, which were the only bases which the District Court had to consider in ruling on the motion, was the need to utilize evidence which had been requested in motions that Edmonds knew had already been denied.

Now on appeal Edmonds asserts that the motion below was actually a request to pursue the appeal *pro se*. The reason for that request, revealed for the very first time in his brief on appeal and unsupported, and in fact refuted in the record, is the claim that his third assigned counsel failed to consult with him and did not include a desired argument in his initial brief.

It is clear that an indigent defendant has a right to defend himself *pro se* and to conduct his own appeal. *Faretta* v. *California*, 422 U.S. 806 (1975); *United States* v. *O'Clair*, 451 F.2d 485 (1st Cir. 1971), *cert. denied*, 409 U.S. 986 (1972); *United States ex rel. Maldonado* v. *Denno*, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966). *United States* v. *Plattner*, 330 F.2d 271 (2d Cir. 1965). It is also clear, however, that he must explicitly request that he be allowed to exercise that right and he must clearly waive his right to assigned counsel; expressing dissatisfaction with assigned counsel does not amount to a request to proceed *pro se*. *United States* v. *Jones*, 514 F.2d 1331, 1334 (D.C. Cir. 1975); *United States* v. *White*, 429 F.2d 711 (D.C. Cir. 1970); *United States* v. *Fay*, 364 F.2d 219 (2d Cir. 1966); *United States* v. *Curtiss*, 330 F.2d 278 (2d Cir. 1964); *United States* v. *Abbamonte*, 348 F.2d 700 (2d Cir. 1965); *United States* v. *Gutterman*, 147 F.2d 540 (2d Cir. 1945).

In this case the District Court in the past had recognized Edmonds' right to defend himself *pro se* and if at the time of the June 20, 1975 hearing Edmonds had asked to pursue the appeal *pro se* the court almost certainly would have allowed it. The only clear statements by Edmonds as to his desires regarding representation for his appeal, however, made at the June 20, 1975 Hearing and at his sentence on August 18, 1975, were that he wanted Mr. Taylor to act as his counsel. Edmonds' No-

tice of Motion and the supporting letter of October 7, 1975 were certainly confusing enough so that their meaning could be interpreted in different ways. In no sense did they amount to a clear request by Edmonds that the efforts of this third assigned counsel be ignored and that he be allowed to pursue the appeal *pro se*.

Moreover, even if at that time of his motion Edmonds had clearly requested to brief and argue the appeal *pro se* the District Court should still have denied his request. The right to defend oneself *pro se*, like the right to assigned counsel, is not unqualified. A request to exercise the right must be timely made and if it merely amounts to a means of delaying or obstructing proceedings it should not be granted. *United States* v. *Pike*, 439 F.2d 695 (9th Cir. 1971); *United States* v. *Ellenbogen*, 365 F.2d 982 (2d Cir. 1966); *United States* v. *Fay*, 348 F.2d 705 (2d Cir. 1965); *United States ex rel. Maldonado* v. *Deno*, *supra*; *United States* v. *Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied, sub nom. Ormento* v. *United States*, 375 U.S. 940 (1963); *United States ex rel. Hyde* v. *McMann*, 263 F.2d 940, 943 (2d Cir. 1959). Furthermore, a defendant who elects to represent himself must abide by the relevant procedural and substantive rules. *Faretta* v. *California*, *supra*.

In this regard the right to defend oneself *pro se* is no greater than the right of a defendant able to retain counsel to have counsel of his choice. That right is limited in that a defendant cannot at the last moment prior to trial or some other proceeding decide to change counsel if the result would be that the proceeding would be delayed or disrupted. *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *Casey*, 480 F.2d 151 (5th Cir. 1973); *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir. 1972); *United States ex rel. Baskerville* v. *Deegan*, 428 F.2d 714 (2d

Cir. 1970); see *Ungar* v. *Sarafite*, 376 U.S. 575 (1964); *United States* v. *Paccione*, 224 F.2d 801 (2d Cir. 1955).

Here, Edmonds initially requested that assigned counsel prepare the appeal. He then conditioned his belated motion for withdrawal of his appeal upon a request for an additional *six months* within which to prepare another appeal. In short, even if Edmonds had specifically moved to act *pro se* on his appeal, granting the motion would have amounted to suspending the normal rules governing the appellate process in the absence of any legitimate, much less compelling, reason. It would also have seriously delayed and disrupted the proper resolution of Edmonds' appeal. Furthermore, the District Court was well aware of Edmonds' past history of baselessly attacking assigned counsel, and could properly consider this history in denying Edmonds' motion. *See United States* v. *Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

Finally, the reasons now stated in support of Edmonds' alleged request to represent himself *pro se* not only were not advanced in any form to the District Court but also are completely without merit. As noted earlier the District Court was never told of Edmonds' allegations that assigned counsel had not consulted with Edmonds or that counsel was not going to include an important argument in the brief. Actually the record shows that assigned counsel consulted on numerous occasions with Edmonds and that assigned counsel in no sense failed in any meaningful way to properly represent Edmonds.* Accordingly, because of the total lack of merit to those claims, even if the District Court had at the time of the motion been advised of Edmonds' current complaints, it still should have denied his request for more than six additional months to brief the appeal.

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* See Point II, *infra*.

POINT II

Edmonds Was in All Respects Afforded His Full Constitutional Right to Effective Assistance of Counsel on the Direct Appeal of His Conviction.

Edmonds claims that he was denied effective assistance of counsel on his trial appeal. His argument is based on fiction and is frivolous.

Edmonds contends that he had only one face to face meeting with Mr. Taylor. Mr. Taylor's affidavit, filed in the District Court prior to the earlier appeal proceeding, squarely refutes this claim. (Taylor Affidavit of September 22, 1975). Edmonds also asserts, without any support in the record, that he told assigned counsel the day of the sentencing that he, Edmonds, would prosecute the appeal *pro se*, and that he merely wanted counsel to comment on his work. The record of the sentence proceedings, however, establishes that on that same day Edmonds not only expected but desired that Mr. Taylor actually represent him on the appeal (Sentencing Minutes August 18, 1975). Therefore, little credence should be given his contrary claim raised on the appeal.

Edmonds further claims for the first time that assigned counsel declined, in the face of Edmonds' request, to argue on appeal that Edmonds' right to "confront his accusors" was violated because he was unable to cross-examine the informant who provided the probable cause for Edmonds' arrest, but who did not testify at trial. Even assuming that Edmonds made such a request, his current argument is baseless.

Assigned counsel fully argued and this Court fully considered Edmonds' claim based on *Roviaro* v. *United States, supra*, that fundamental fairness required that

the Government reveal the identity of the informant. Nonetheless, present counsel for Edmonds broadly claims that the confrontation argument to which he refers is somehow different. Actually, counsel does nothing beyond stating that such an argument should have been made; at no time does he provide even the barest hint of what the theory of such an argument, distinct from the *Roviaro* contention, might be. That omission is not surprising since the confrontation right is grounded in an ability under certain circumstances to cross-examine persons whose statements or testimony in one way or another are presented at trial to the jury as evidence of a defendant's guilt. *Dutton* v. *Evans*, 400 U.S. 74 (1970); *California* v. *Green*, 399 U.S. 149 (1970); *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965). Here, the only statements of the informant made known to the jury were deliberately elicited by defense counsel on cross-examination of a Government witness in furtherance of the defense trial strategy. (Tr. 61). At no time did the Government elicit from any of its witnesses anything which had been related to them by the informant. Thus, Edmonds has failed to even show that anything that the informant related to the Government was used by the Government against him in evidence at trial. It appears somewhat incomprehensible to complain about the inability to cross-examine one whose statements were not offered against you at trial. The point here is not merely that under present law the confrontation clause did not require disclosure of the identity of the informant, but rather that Edmonds' present counsel has not even articulated any possible rational argument that could have been made by earlier assigned counsel in addition to the issue raised under *Roviaro*.

Finally, if Mr. Taylor had made the kind of baseless, frivolous argument now suggested he would simply have been acting as the errand boy of his client and that is not

the role of assigned counsel. *See United States* v. *O'Clair*, 451 F.2d 485 (1st Cir.), *cert. denied*, 409 U.S. 986 (1971). Rather, assigned counsel's role is to make every argument of possible merit in the exercise of his professional abilities on behalf of his client. *United States* v. *Calabro*, 467 F.2d 973 (2d Cir. 1972). There is no evidence in this case that counsel failed to do exactly that.*

This Court has made it clear that to justify reversal of a proceeding on the basis of ineffective assistance of counsel the assistance complained of must have been so ineffective as to "shock the conscience of the Court and make the proceeding a farce and a mockery of justice." *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) or "so 'horribly inept' as to amount to 'a breach of his legal duty faithfully to represent his clients interests.'" *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 109 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971). Other circuits have relaxed somewhat the standards for concluding that ineffective assistance was rendered by counsel, *Garland* v. *Cox*, 472 F.2d 875 (4th Cir.), *cert. denied*, 414 U.S. 908 (1973)** but this Court has recently and often adhered

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* Edmonds also now claims that he did not receive notice of the original decision of this Court until September 1976 and that he thereby was prevented from petitioning for a writ of certiorari to the Supreme Court. That factual allegation appears false. The Pro Se Clerks Office mailed Edmonds a notice on June 22, 1976 which reflected the decision. (June 2, 1976 Order Denying Bail Application). Moreover, if Edmonds had competently shown lack of notice he could have obtained a waiver of the time requirement on filing such a petition. *See Durham* v. *United States*, 401 U.S. 481 (1971).

** In *Garland*, a case in which counsel was appointed 15 minutes prior to trial, the Fourth Circuit Court of Appeals followed its rule that the burden of proving lack of prejudice shifts to the government in instances of late appointment of counsel which is prima facie prejudicial.

to the same stringent standards. *United States* v. *Joyce*, Dkt. No. 76-1182, slip op. 1, 4 (2d Cir. Sept. 20, 1976); *United States ex rel. King* v. *Schubin*, 522 F.2d 527 (2d Cir.), *cert. denied*, 423 U.S. 990 (1975); *United States* v. *Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974); *United States ex rel. Testamark* v. *Vincent*, 496 F.2d 641 (2d Cir. 1974); *United States* v. *Sanchez*, 483 F.2d 1052 (2d Cir. 1973); *United States ex rel. Crispin* v. *Mancusi*, 448 F.2d 233 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971). In any case, under even the most relaxed standards, Edmonds' unsupported claims do not even begin to substantiate a claim of ineffective assistance of counsel, and are just as baseless and ill-founded as his earlier attacks on Messrs. Thau and Kessler.

CONCLUSION

The order of the District Court denying Edmonds' motion should be affirmed.

Respectfully submitted,

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Ronald H. Sim being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29th day of November, 1976 he served 1 copies of the within Brief by placing the same in a properly postpaid franked envelope addressed:

DANIEL J. KORNSTEIN, ESQ.
BAER & McGOLDRICK
460 Park Avenue
New York, New York

And deponent further says that he sealed the said envelope and placed the same in the mail ——— drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Ronald H. Sim

Sworn to before me this

29 day of November 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. [illegible]25
Qualified in Kings County
Commission Expires March 30, 1977